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Court of Appeals No. 56272-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 2

State of Washington

v.

Travis L. Coluccio

Lewis County Superior Court

Cause No. 20-1-00467-1

The Honorable Judge Joely O'Rourke

Appellant's Reply Brief

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ARGUMENT

MR. COLUCCIO’S CONVICTION MUST BE REVERSED BECAUSE THE COURT DID NOT INSTRUCT JURORS ON THE “TRUE THREAT” REQUIREMENT.

The prosecution was required to prove a “true threat” at Mr. Coluccio’s trial for intimidating a public servant. *State v. Kilburn*, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004); *State v. Kohonen*, 192 Wn. App. 567, 575, 370 P.3d 16 (2016); *see* Appellant’s Opening Brief, pp. 7-10.

The court did not instruct jurors that conviction required a “true threat.” CP 3-21. The error requires reversal because the evidence was not “uncontroverted.” *State v. Schaler*, 169 Wn.2d 274, 288-89, 236 P.3d 858 (2010); *see* Appellant’s Opening Brief, pp. 9-10.

Respondent argues that Mr. Coluccio invited the error. Respondent’s Brief, pp. 6-9. This is incorrect.

The State bears the burden of proof on invited error. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). The doctrine applies “when a party takes ‘affirmative and voluntary action’ that induces the trial court to take an action later

challenged on appeal.” *Shavlik v. Dawson Place*, 11 Wn.App.2d 250, 270, 452 P.3d 1241 (2019).

Mr. Coluccio did not take affirmative and voluntary action to create error. Instead, he properly proposed an instruction defining “threat” in accordance with the statutory language. CP 66; RCW 9A.76.180(3). He is not challenging that instruction, which the court incorporated as Instruction No. 6. CP 11; *see* Appellant’s Opening Brief, pp. 7-10. The error is not invited. *Id.*; *see also State v. Harmon*, 20 Wn. App. 2d 1076 (2022), *review denied*, 510 P.3d 999 (Wash. 2022) (unpublished).

Had Mr. Coluccio objected to a “true threat” instruction proposed by the State, he would have invited the error. *Shavlik*, 11 Wn.App.2d at 270. The State did not offer a “true threat” instruction, and Mr. Coluccio did not object to such an instruction. CP 67-87.

Respondent cites no authority suggesting that the invited error doctrine applies when a litigant proposes a proper instruction and does not challenge that instruction on appeal. Respondent’s Brief, pp. 6-9. Where no authority is cited, this

court should presume that Respondent has found none after diligent search. *See City of Seattle v. Levesque*, 12 Wn.App.2d 687, 697, 460 P.3d 205 (2020).

Mr. Coluccio did not invite the error. His conviction must be reversed, and the case remanded for a new trial with proper instructions. *Schaler*, 169 Wn.2d at 288-289.

CONCLUSION

Mr. Coluccio's conviction must be reversed. The court did not instruct jurors that conviction required proof of a "true threat." Mr. Coluccio did not invite the error.

Certificate of Compliance

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 418 words, as calculated by our word processing software.

Respectfully submitted on August 30, 2022,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
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A handwritten signature in blue ink, reading "Manek R. Mistry". The signature is fluid and cursive, with the first name "Manek" being the most prominent.

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date, I mailed a copy of this document to:

Travis Coluccio
1462 Rush Road
Chehalis, WA 98532

I CERTIFY UNDER PENALTY OF PERJURY
UNDER THE LAWS OF THE STATE OF
WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.

Signed at Olympia Washington on August 30,
2022.

A handwritten signature in blue ink that reads "Jodi R. Backlund". The signature is written in a cursive, flowing style.

Jodi R. Backlund, No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

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